May 23, 2007

**PRIVILEGED ATTORNEY/CLIENT COMMUNICATION**

Patti Harrington, Ed.D.
State Superintendent of Public Instruction
Utah State Office of Education
P.O. Box 144200
Salt Lake City, Utah 84114-4200

Dear Superintendent Harrington:

I am writing in response to your letter, which I received on May 14, 2007, in which you requested my legal advice on twenty-five questions posed by the members of the Utah State Board of Education (the "Board") regarding implementation of the voucher program. In an e-mail to me dated May 27, 2007, Kim Burningham asked for our responses to be privileged and confidential. I am grateful for Kim's and your recognition of the attorney-client relationship between you, the Board and the Utah State Office of Education ("BOE"), and me and my office. By asking for our legal advice, the Board has demonstrated it's trust in our expertise and professionalism, and that is truly appreciated.

As indicated above, this opinion is confidential attorney-client communication to the Board of Education, in responses to the Board's request, and may only be disclosed to others with the Board's permission. I, as your attorney, will not disclose it without the Board's permission, consistent with our attorney-client relationship. It will be a "protected record" under the Government Records Access and Management Act, UCA Sec. 63-2-304(18). Any public officer or employee who knowingly discloses or improperly uses such protected information may be guilty of a violation of the Utah Public Officers' and Employees' Ethics Act, UCA Sec. 67-16-4(1)(b).

Thank you for the recognition of the burdensome nature of the request. I trust that the time spend in drafting this detailed response will provide you, the Board and the USOE with all the legal guidance necessary for the Board to move forward in implementing "The Parent Choice in Education Program" law.

## LEGAL ANALYSIS & GUIDANCE

1. *Does the State Board of Education have clear authority to develop and write definitions based on its own expertise on the education voucher issue?*
   - *A. In developing the rules, could staff use information about successful and unsuccessful voucher programs in other states to develop definitions?*
   - *B. Legally, could USOE-developed definitions rely on and reference legislative intent of H.B. 148.*
   - *C. The definition is missing, but there is some description of "eligible private schools in Section 53A-1a-805, can and/or should the Board enhance this section with a definition?*
   - *D. Is the Board in a stronger or weaker legal position if it relies on previous legislative intent (that technically disappears with H.B. 148) or if it develops definitions consistent with its experience and expertise?*
   - *E. The following are examples of crucial, but now undefined, terms (references are to line numbers in H.B. 174):*
     - *(1) What does "adopt" (line 256) mean?*
     - *(2) How should "private school" (line 43, line 83) be defined?*
     - *(3) How should "scholarship student" (line 84) be defined?*
     - *(4) How should "income" (line 49) be defined?*
     - *(5) How "parent"* [sic] *(line 54) be defined?*

Utah Code Annotated Section §53A-1-401(2) states that the Board has the authority to adopt rules and policies in accordance with its responsibilities under state law. H.B. 174, codified in sections §§53A-1a-804 to -806, -808, and -811, is currently state law in regard to Utah's educational voucher program. The statute specifically mandates that "the board shall make rules consistent with this part." Utah Code Ann. § 53A-1a-808(1) (emphasis added). The whole of The Parent Choice in Education Program is contained in "part" eight of Title 53A, "State System of Education," Chapter 1a, "Utah Strategic Planning For Educational Educational Excellence." Accordingly, the Legislature has delegated to the Board a broad grant of authority to adopt rules and policies in order to implement the voucher program.

In analyzing agency rulemaking authority, Utah courts will begin with a presumption of validity. South Cent. Utah Telephone Ass'n, Inc. v. Auditing Div. of Utah State Tax Comm'n., 951 P.2d 218 (Utah 1997); Beard v. Board of Educ. of N. Summit School Dist., 81 Utah 51, 16 P.2d 900, 903 (1932). Any administrative "rule should be construed and applied as to make it conform to

the powers conferred upon the administrative body, rather than as being an assumption of power not conferred." Consolidation Coal Co. v. Utah Div. of State Lands & Forestry, 886 P.2d 514, 527 (Utah 1994) (quoting McKnight v. State Land Bd., 14 Utah 2d. 238, 381 P.2d 726, 731 (Utah 1963)(quoting 42 Am.Jur. *Public Admin. Law* § 101)).

While the authority to write definitions may not be explicit in H.S. 174, "[t]he legislative grant of authority to the administrative agency is necessarily in general language. It is the responsibility of the administrative body to formulate, publish and make available to concerned persons rules which are sufficiently definite and clear that persons of ordinary intelligence will be able to understand and abide by them." Athay v. State of Utah, Dept. of Business Regulation, Registration Div.,626 P.2d 965, 968 (Utah 1981). In so doing, the Board "may rely on its own experience, its expertise, and any facts known to it from whatever source they are drawn." Utah Restaurant Assoc. V. Salt Lake City-County Bd. of Health, 771 P.2d 671, 675 (Utah Ct. App.1989); see 1 K. Davis, *Administrative Law Treatise* § 6.17 (2d. Ed. 1978).

The Board's ability to create definitions of operative terms, many of which are educational in nature, is well within the province of its expertise. Indeed the Legislature has delegated to the Board general control and supervision of the state's public education system, including the duty to establish rules governing access to programs. Utah Code Ann. §§ 53A-1-401(1)(a), -402(1)(b)(I). This expertise and authority places the Board in the best position to interpret and define these terms. Associated General Contractors v. Board of Oil, Gas and Mining, 2001 UT 112, ¶19, 38 P.3d 291, 297-98 (stating that where Board has expertise and authority in areas covered by Board crafted definitions, courts will review such definitions based on an arbitrary and capricious standard); see also, Morton Int'l Inc. v. Auditing Div. of Utah State Tax Comm'n, 814 P.2d 581, 586-87 (Utah 1991).

As previously stated, the Board may rely on any sources it chooses to draft reasonable rules and definitions. At this point the final status of H.B. 148 is uncertain. However, any definitions, rules, policies or procedures the Board drafted in accordance with that bill would only serve to enhance the likelihood that the Board's actions mirrored the legislative intent for this program, thus providing further protection for the Board's actions. Also, if H.B. 148 is approved in the upcoming election, having rules in place which are consistent with the mandates of H.B. 148, would allow a seamless and efficient blending of the two laws should that necessity arise.

With regard to defining "eligible private school," Utah Code Ann. §53A-1a-805 specifies the requirements for a private school to be eligible to enroll a scholarship student under this program; thereby effectively defining an eligible private school. While the Board may include a specific definition of "eligible private school," it should guard against regulating private schools beyond that expressly provided for in Utah Code Ann. §53A-1a-805. Courts will only uphold and apply an agency's definition which does not confer greater rights or disabilities than the

governing statute and can be construed consistent therewith. Morgan County v. Holnam, Inc., 2001 UT 57, ¶ 10, 29 P.3d 629, 632.

Insofar as this question lists other terms that the Board may wish to define in its rules, I decline to opine as to what constitutes a proper definition. As the courts are unwilling to substitute their judgment on what constitutes a reasonable rule or definition, likewise it is not the place of the Attorney General to dictate to the Board specific definitions of these terms. Crafting definitions is clearly within the gambit of rulemaking and policy decisions appropriately left to the Board's expertise.

In sum, the broad grant of general rulemaking authority to the Board to implement the voucher program would necessarily include the ability to adopt any rules and definitions necessary to do establish the program in accordance with the Legislature's intent. Moreover, the controlling statutes and case law support the Board's authority to develop said rules, including reasonable definitions.

2. *Does the State Board of Education have clear constitutional and statutory authority to fill in missing, necessary definitions-some of which were **never** included in H.B. 148– including, but not limited to, "eligible student," "tuition," "agreed upon procedures," and "audit"?*

This question was essentially answered by the response above. However, by way of further guidance, a "rule" is defined in Utah Code Ann. §63-46a-2(16) as an agency's written statement that is explicitly or implicitly required by state statute, which implements or interprets a state legal mandate. Thus, if the Board's ability to implement the voucher program is predicated on the necessity of drafting "missing, necessary definitions," that exercise of rulemaking authority will undoubtedly be upheld.[1]

3. *What are the legal ramifications of a statutory mandate to the Board to create rules for a section of Utah Code that was stayed by the referendum of H.B. 148? H.B. 174 requires the Board to make rules implementing 53A-11a-807, which does not exist in H.B. 174. Can the Board safely ignore the statutory mandate?*

[1]If the Board is looking for guidance in drafting a definition of "audit," the Milwaukee voucher program regulations may be helpful insofar as that program requires participating private schools to submit to financial and performance audits by both the State Superintendent and Legislative Audit Bureau. See Wisc. Stat. § 119.23(7)(b), (8), and (9).

Given that Utah Code Ann. §53A-1-807 is currently stayed, the mandate to implement those regulations is similarly stayed. Therefore, the Board is under no obligation to implement rules in accordance with a section of the law that is not currently in effect.

4. *While trying to resolve the statutory mandate of #3, above, the State Board may miss the statutory requirement of H.B. 174 "By May 15, 2007, the board shall adopt rules establishing . . .." What are the legal ramifications of missing this deadline?*
   *A. What is the conflicting (supporting and contrary) legal authority for not implementing rules by May 15, given the intervening referendum sufficiency?*
   *B. Is failure to implement on the required date a mandate to be interpreted strictly, given notice to the Board of the referendum sufficiency on April 30, 2007, three days before the State Board meeting?*

The legal ramifications of missing the statutorily mandated deadline is that the Board is no longer in compliance with the law. As such the Board is susceptible to a lawsuit for its failure to adopt rules in accordance with Utah Code. Ann. §53A-1a-808(2). The Board has been on notice since the passage of H.B. 174 that it had a duty under that referendum-proof law to adopt rules in order to implement the voucher program by May 15, 2007. Since March, the Board has been aware of the May 15th deadline mandated in H.B. 174, and of my Attorney General Opinion No. 07-002 that H.B. 174 is the law and could be implemented independent of H.B. 148. The intervening referendum on H.B. 148 did not alter the Board's responsibilities to adopt rules in accordance with H.B. 174, which is the current law. "When a legislative body, whether of the state or of a local government, enacts a statute or an ordinance, that law applies to everyone within the geographical area over which that body has jurisdiction." University of Utah v. Shurtleff, 2006 UT 51 ¶ 25, 144 P.3d 1109, 1115. Accordingly, the Board is "never exempt from the obligation of all Utah citizens and entities to follow Utah law." Id. at ¶ 39, 144 P.3d at 1118.

5. *The Lieutenant Governor's announcement on April 30, 2007 of sufficient signatures for HB 148 to be referred to the voters also stayed the implementation of HB 148. The stay of HB 148 also removed all General Fund money allocated to the Board of Education/Utah State Office of Education for administrative work on HB 148. Even if the Board agrees with the Attorney General that funds may be requested under SB 3, Item 135 to implement an "Education Voucher Program." those funds are not available until July 1, 2007. Funds appropriated in HB 174 are available beginning July 1, 2007. What constitutional limitations and/or risks does administrative work on an education voucher program for which no General Fund appropriations are available pose for the State Board of Education and/or the USOE?*

There are no constitutional limitations and/or risks for the Board in performing administrative work on the education voucher program when no General Fund appropriation monies will be forthcoming until July 1, 2007. Given that the voucher program, created by H.B. 174, is the

current law in Utah, and the Board has been statutorily charged with its implementation, the fact that monies will not be immediately forthcoming to fund the initial administrative work is not a constitutional violation. The legislature often statutorily assigns additional duties to state agencies without providing additional funding to offset the increased administrative costs associated with performing such duties. See House Bill 291, 2007 (requiring the Board to establish rules regarding the acceptance of nonresidents without providing any legislative appropriation to fund costs associated with rulemaking). No constitutional issues are raised so long as the duties being performed are in accordance with a legislative mandate and no Uniform School Funds are being used. Accordingly, the USOE is able to utilize its discretionary General Fund monies to adopt rules to implement the voucher program under H.B. 174 and offset those monies against the July 1st appropriation. Indeed, without an intimate knowledge of the USOE's budget, it appears that the office can utilize the same funding source it used to fund the costs associated with the approximately 300 man hours it reportedly spent on drafting the now-tabled H.B. 148 voucher rules.

6. *What state and federal constitutional issues does the omission of the purpose language that the law "was enacted for the valid secular purpose of tailoring a child's education to that child's specific needs as determined by the parent; (b) neutral with respect to religion" raise?*
   - A. *Does the Board have the constitutional and statutory authority to write administrative rules, adopt policies, develop definitions to ameliorate this concern?*
   - B. *Does the omission of the language pose a genuine constitutional question or is the language reassuring surplus verbiage?*
   - C. *Is the State Board in a stronger or weaker position, should there be constitutional challenges, if the Board incorporates the language into its rules or ignores the language as vestiges of HB 148?*

Omission of the purpose language does not in and of itself raise any constitutional issues. Utah's voucher program is designed to provide educational choices for families, which has been deemed a valid secular purpose. Zelman v. Simmons-Harris, 536 U.S. 639, 649, 122 S. Ct. 2460, 153 L.Ed. 2d 604 (2002) (upholding Ohio voucher program). In general, the U.S. Supreme Court is reluctant "to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute." Mueller v. Allen, 463 U.S. 388, 394-395 (1983). There is no dispute "that education constitutes a valid public purpose, nor that private schools may be employed to further that purpose." Davis v. Grover, 166 Wisc.2d 501, 480 N.W.2d 460, 475 (Wisc. 1992) (upholding the Milwaukee voucher program).

While statutory language would have provided a clear indication of the legislature's intent in enacting this program, and thus aided any court examining this issue, its omission does not in

and of itself raise any constitutional issues. Given its usefulness in determining legislative intent, its inclusion amounted to more than "reassuring surplus verbiage."

Given my opinion that the Board has been given a broad grant of rulemaking authority to implement the voucher program, the Board may include "secular purpose" language into its rules. However, in any constitutional challenge to the statute, the Board's rules will not be as persuasive as statutory language, which would provide a clearer indication of legislative intent.

7. *May the State Board, as it develops definitions, prohibit eligible private schools from discriminating against students with disabilities?*
   - *A. Could State Board rules require or allow for public schools to work with eligible private schools to provide specific student services, consistent with Agostini v. Felton and Wolman v. Walter and related cases?*
   - *B. Could the State Board rules require eligible private schools to comply with the Americans with Disabilities Act in order to adequately accommodate students with disabilities?*

Prevailing case law and the United States Department of Education ("USDE") have specifically stated that Title II of the Americans with Disabilities Act ("ADA")[2] does not apply to private schools, even those receiving state funded vouchers, insofar as private schools are not public entities. *Letter to Bowen*, 35 IDELR 129 (ED, March 2001). Nonetheless, the USDE has stated that the ADA applies to a state's administration of its voucher program. Accordingly, under Title II of the ADA a state education agency must ensure that participating private schools do not exclude [voucher recipients] with a disability "if the person can, with minor adjustments, be provided an appropriate education within the school's program." Id.[3] On the other hand, the State would not be required to ensure that participating private schools provide FAPE to students with disabilities in the least restrictive environment if the schools do not offer programs designed to meet those needs. See 34 CFR Part 104, App. A at 28.

With regard to special education and related services, the USDE opined that if a state board of education

[2]Title II of the ADA states: "No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity. 42 USC § 12132.

[3]In accordance with this principle, the participating private schools in the Milwaukee voucher program are statutorily prohibited from discriminating in admissions against children with special needs but are only required to provide services that require "minor adjustments." Davis v. Grover, 166 Wisc.2d 501, 480 N.W.2d 460 (Wisc. 1992).

> and its local school districts have made FAPE [Free Appropriate Public Education] available to eligible children with disabilities in a public school, but their parents elect to place them in private schools through [a voucher program], then such children are considered "private school children with disabilities" enrolled by their parents. Under IDEA, such parentally placed private school students with disabilities have no individual entitlement to a free appropriate public education including special education and related services in connection with those placements.[4] Id.

Unlike Title II, secular private elementary and secondary schools are places of public accommodation to which Title III applies[5]. 42 U.S.C. § 1218(7)(J); see Bercovitch v. Baldwin School, 133 F.3d 141, 153 (1st Cir. 1998); Axelrod v. Phillips Academy, Andover, 46 F.Supp.2d 72, 82 (D. Mass. 1999); Thomas v. Davidson Academy, 846 F.Supp 611 (M.D. Tenn. 1994). Accordingly, secular private schools regardless of any voucher program requirements need to comply with the ADA. However, the ADA explicitly exempts "[r]eligious organizations or entities controlled by religious organizations" from compliance with Title III. 42 U.S.C. §12187. "This exemption is very broad . . . [e]ven when a religious organization carries out activities that would otherwise make it a public accommodation, the religious organization is exempt from ADA coverage." 28 CFR Part 36, Appendix B. Thus, private schools which are owned and operated by a religious organization are exempt from the ADA. Marshall v. Sisters of the Holy Family of Nazareth, 399 F.Supp2d 597, 605-06 (E.D. Pa. 2005).

In sum, it appears that application of the ADA to private schools is based solely on the specific provisions of the ADA, and will not be altered by their acceptance of voucher funds. In tempering this outcome, the USDE has stated that the ADA applies to a state education agency's administration of its voucher program.

The cases cited in Question 7(A) allow public schools, through the state, to work together to provide certain services to nonpublic schools without raising certain constitutional issues, such as excessive entanglement. Agostini v. Felton, 521 U.S. 203, 232, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). Such constitutionally approved services including the following: books, instructional materials, instructional equipment, standardized testing and scores, diagnostic

[4]The USDE did, however, note that IDEA includes a process through which limited special education services may be provided to students with disabilities in private schools. Id.

[5]Title III of the ADA states: "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation. . . ." 42 U.S.C. § 12181 et seq.

services, field trip transportation, and remedial instruction to disadvantaged students on a neutral basis. Id.; Mitchel v. Helms, 530 U.S. 793, 830, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000); Wolman. v. Walter, 433 U.S. 229, 238, 241-2, 247-8, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977). None of these cases, however, require the State to provide such services to private schools.

8. *What legal effect does the title to H.B. 174 have, as well as numerous references to "amendments" or modifications," on the analysis that H.B. 174 stands alone given Utah Supreme Court precedent that the title may be an interpretive tool? What is the legal effect of the bill's title given statutory language that Legislative Research has authority to change a bill title to more accurately reflect the bill's substance?*

It is undisputed that the title of a statute can be utilized as an interpretative tool where statutory language is ambiguous. Jenkins v. Percival, 962 P.12d 796, 800 (Utah 1998). "Nevertheless, `a statute's title is not part of its text and cannot be used as a tool of statutory construction unless the statute's language is ambiguous." Anderson Dev. Co. , L.C. v. Tobias, 116 P.3d 323, 336, 528 Utah Adv. Rep. 3, 2005 UT 3 (Utah 2005) (quoting Stephens v. Bonneville Travel, 935 P.2d 518, 521-22 (Utah 1997)).

The Constitution requires that the subject matter of the statute be clearly expressed in the title. Utah Const. Art 6 § 22. The subject-matter of H.B. 174, education vouchers, was clearly expressed in the title. Because H.B. 148 had already been passed and was entitled "Education Vouchers," a second bill similarly entitled would only have created confusion. The Office of Legislative Research and General Counsel has the authority to correct "technical errors" under Utah Code Ann. §36-12-12(2)(g). In fulfilling its duty that office shall "eliminat[e] duplication and the repeal of laws directly or by implication . . ." Utah Code Ann. §36-12-12(3)(b). Without substituting my judgement for that of the Office of Legislative Research and General Counsel, it seems clear that other title choices might have duplicated the title of the initial bill or implied a repeal of H.B. 148, neither of which was the legislative intent. Clearly, the intent of H.B. 174 was to coordinate with H.B. 148, and for H.B. 174's specific sections to supercede those similarly enumerated in H.B. 148. Accordingly, it does not appear to be a dereliction of duty that the Office of Legislative Research and General Counsel chose to leave the title of H.B. 174 as "Education Voucher Amendments."

Finally, the references to "amendments" or "modifications" will be analyzed as part of the statutory language along with the words "superseding" and "ENACTS" in the event that a court examines H.B. 174. For a further explanation of my position that H.B. 174 can be implemented independent of H.B. 148, please refer to the Utah Attorney General's Opinion No. 07-002 provided to Governor Huntsman on March 27, 2007.

9. *The Board has received threats of lawsuits if it implements H.B. 174 AND if it does not implement H.B. 174. Is the Board in a stronger legal position if it is forced to implement*

*H.B. 174 by a court? Will the State Board be defended by the Attorney General's Office if it implements H.B. 174 OR if it waits, completing due diligence in developing a revised rule and considering the threat of litigation, to implement until directed by the court?*

My soundest legal advice is that an agency is always in a more defensible legal posture if the agency has implemented and adhered to the law currently in effect. Indeed, an agency decision will be deemed "arbitrary and capricious" if it is a willful or unreasonable action made in disregard of the law. Black's Law Dictionary 105 (6th ed. 1990). As previously stated, the Board is never exempt from the obligation to follow Utah law. University of Utah v. Shurtleff, 2006 UT 51 ¶ 39, 144 P.3d 1109, 1118. Any decision by the Board to wait to implement the law until forced to do so by a court, implies that the Board disregarded the law and the underlying legislative mandate to implement the voucher program. It is my opinion that such inaction places the Board in a vulnerable legal position.

Without speculating as to the type of defense necessitated by the Board in either of the outlined hypothetical scenarios above, I can guarantee that my office will fulfill its statutory duties to provide zealous representation to the Board pursuant to Utah Code Ann. § 67-5-1, et. seq. See UT. Attn'y Gen. Policy Manual, Opinion Policy, §5.10(B)(1) (stating that hypothetical and abstract issues are inappropriate subjects for attorney general opinions). As explained in our meeting on May 18, 2007, the Board's representation will be assigned to one or more assistant attorneys general within the office. All of the attorneys in my office are professionals who highly value their oaths of office and the Utah State Bar's Code of Professional Responsibilities. This includes the duty to zealously represent clients within the bounds of the law. Unlike Carol and Jean, assistant attorneys general have merit protection under career service statutes. On rare occasions attorneys in my office are called upon to represent different state agencies or employees in sometimes competing or conflicting interests or legal actions. In such circumstances, effective "Chinese Walls" have been erected and client interests, privileges and privacy have been protected.

10. *Would the Attorney General be willing, on behalf of the Board, to seek a declaratory judgment that H.B. 174 is sufficient to implement a voucher program-should the Board desire to resolve the competing advice though the courts? What is the case law, legally encouraging or discouraging, such an action?*
    - A. *If a district court ruled, would the Attorney General's Office be willing to appeal as the Board's counsel, at the Board's request?*
    - B. *If a district court found that H.B. 174 was NOT sufficient, would the Attorney General's Office vigorously resist pressure from the Legislature or Governor to appeal the decision if the Board, as the client, did not want to appeal? What conflicts of interest might arise for the Attorney General that would need to be reviewed and possibly waived by the State Board?*

There is Utah case law to support the position that the attorney general has the power to initiate a declaratory judgment action to determine the constitutionality of legislative enactments. See Guinther v. Wilkinson, 679 F.Supp 1066, 1069 (D. Utah 1988); Hansen v. Barlow, 23 Utah 2d 47, 456 P.2d 177 (Utah 1969); Cooper v. State of Utah, 684 F.Supp 1060 (D. Utah 1987). While the attorney general has this right, the Utah Supreme Court has stated that it should only be exercised if the attorney general believes that a statute is unconstitutional. Hansen, 23 Utah 2d at 53. Given my recent opinion to the Governor wherein I stated that H.B. 174 is sufficient to independently implement the voucher program, it would be inconsistent for me to initiate a declaratory judgment action contrary to that opinion.

In Cooper, a Utah federal district court judge took the Attorney General to task for failing to appeal a state district court's ruling that a particular statute was unconstitutional. 684 F. Supp at 1068. "The prior action of the Attorney General, in failing to appeal the state judgment and failing to obtain an effective ruling by the Supreme Court of Utah of general and statewide applicability, has only added to the uncertainty of the constitutional status of the Utah statutes." Id. Thus, there is some support for the position that the Attorney General should appeal a determination of unconstitutionality to the Utah Supreme Court.

However, given that your question deals with the sufficiency of H.B. 174 rather than the constitutionality of such, a strict duty to appeal to the Utah Supreme Court would not necessarily be mandated under our case law. In fulfilling my statutory duty to provide the Board with legal representation, this office would certainly discuss the necessity of any appeal with you before proceeding to act. From a practical standpoint, given the widespread public debate surrounding the voucher program, it is unlikely that litigation on this issue will be settled at any level below the Utah Supreme Court.

Lastly, at this point without knowing the procedural posture of the hypothetical case outlined in your question, nor the exact parties involved, it is impossible to know what conflicts might arise that would need to be disclosed to or waived by the Board. See UT. Attn'y Gen. Policy Manual, Opinion Policy, §5.10(B)(1) (hypothetical and abstract issues are inappropriate subjects for an attorney general opinion). Nevertheless, as specific factual circumstances arise, I look forward to discussing them with the Board and the USOE and advising you on how we can best address any conflicts of interest.

11. *Court deference to agency rulemaking is well established. Consistent with this deference and the State Board's independent constitutional status, will the Attorney General's Office provide representation to the USOE and Board member(s) who are summoned to the Administrative Rules Review Committee hearings to defend the Board's actions?*

The Administrative Rules Review Committee ("ARRC") is a joint legislative committee which discusses proposed and effective rules which have been brought to its attention. The ARRC has

no direct power to delay or change an administrative rule, and merely reports its findings to the Legislature. As such, appearance before the ARRC is not an adversarial proceeding in which the Board or its members would need legal representation. Nonetheless, our office is always available to consult with any state board to discuss appearances before a legislative body.

12. *Does the State Board have the legal authority to create reasonable enforcement and penalty provisions, provided in HB 148 but missing in HB 174, for willful misrepresentations, omissions or fraudulent actions by parents or eligible schools seeking to participate in a voucher program?*

Again, the broad powers vested in the Board in implementing the educational voucher program allows the Board to draft reasonable enforcement provisions. Utah courts have explicitly recognized a school board's authority to make and enforce rules "necessary for the maintenance, prosperity, and success of the schools and the promotion of education." Save of Schools v. Bd. of Educ. of Salt Lake City, 2005 UT 55, ¶18, 122 P.3d 611, 614 (quoting Board of Educ. v. Ward, 1999 UT 17, ¶ 9, 974 P.2d 824)).

Although H.B. 174 does not specifically state that the Board's rulemaking powers extend to the creation of enforcement and penalty provisions, an agency may assert regulatory powers that are "expressly granted or clearly implied as necessary to the discharge of the duties and responsibilities imposed on it." Williams v. Public Service Comm'n, 754 P.2d 41, 50 (Utah 1998). Insofar as the enforcement and penalty provisions are based on an attempt to misrepresent eligibility or defraud the program, such provisions are logical extensions of the underlying application and verification processes over which the Board was given specific rulemaking authority in Utah Code Ann. §53A-1a-808. The Board's statutory responsibilities under Utah Code Ann. §§53A-1a-806(2)(b)(I), -808(1)(b), (2)(b) in verifying a scholarship recipient's parents' income and adopting rules for the application process for private schools, fairly implies that the Board may impose a reasonable penalty for willful misrepresentations, omissions or fraudulent actions by parents or eligible schools seeking to participate in the voucher program.[6] However, any such penalties should be in the nature of administrative consequences in relation to the program insofar as the Board has no authority to impose civil fines or criminal penalties.

13. *If the Board's authority to create reasonable enforcement/penalty provisions is limited, what are the legal consequences, imposed by whom, for parents or schools that*

[6]The power to impose penalty provisions relating to the program itself, such as termination of the right to participate in the program, can also be derived from the contractual relationship between the Board and the offending party. University of Utah, 2006 UT 51, ¶ 27, 144 P.3d at 1116.

*misrepresent information or defraud a state program? Will the Attorney General's Office support the Board, both with expertise and resources, in pursuing these parents and schools and pursue legal action independent of the Board?*

As stated in the answer to question 12, my opinion is that the Board may create reasonable enforcement and penalty provisions subject to the rulemaking provisions of Utah Code Ann. §§ 53A-1-101, et seq., 63-46A-1, et seq., and 53A-1a-808. In addition to any Board imposed penalties, other legal consequences exist for parents or schools that misrepresent information or defraud the voucher program. As I am sure you are aware, the legal consequences, including prosecution for theft and/or fraud, will vary depending on the facts of each case. Likewise, the individual facts of the case will dictate which agency prosecutes the matter, but typically the district or county attorney's office will be responsible for handling such prosecutions. See Utah Code Ann. §§ 10-3-928, 17-18-1. It is unlikely that the Attorney General's Office would take legal action independent of the Board, but again, depending on the allegations against a parent or school, it is possible that there may be circumstances in which the Attorney General's Office would play a role in investigating and prosecuting allegations of misrepresentation or fraud. See Utah Code Ann. § 67-5-1, et. seq.

14. *The section on administrative hearings is missing in HB 174. If State Board definitions and procedures deny a school or parent eligibility, would the absence of administrative procedures result in a denial of due process to parents or schools?*

Again, it is my opinion that the Legislature granted the Board broad rulemaking authority in implementing Utah's new educational voucher program. The Board was explicitly directed to make rules establishing the application process for the scholarship program; this mandate included adopting rules for parents to apply for a scholarship online, as well as those outlining the application processes for private schools and scholarship students. Utah Code Ann. §53A-1a-808(1)(a), (2)(a). The application process of any program undoubtedly involves both the approval and denial of applications. Accordingly, administrative procedures are a necessary component of the Board's authority to adopt rules governing the various application processes in the voucher program. As such, the Board may properly utilize its rulemaking authority to establish administrative procedures to safeguard the due process rights of parents, students and schools.

15. *If H.B. 148 stands after the referendum vote and H.B. 174 has been implemented via the rulemaking process (with additional definitions and requirements), which voucher program prevails? How immediately?*

If H.B. 148 is approved by the voters, then H.B. 174 and H.B. 148 will need to be coordinated in order to lawfully implement the voucher program. See 2007 Utah Laws 174, Section 7 (stating that House Bills 174 and 148 will have to be coordinated when the Office of Legislative

Research and General Counsel prepares the utah Code database for publication). In so doing, the specific provisions of H.B. 174 will supersede those similarly numbered in H.B. 148. At the same time, any enumerated statutory provisions in H.B. 148 not covered by H.B. 174 will become effective. If approved by the voters, H.B. 148 will take effect on the date specified in the referendum petition, or if the petition did not specify a date, it will take effect five days after the date of the official proclamation of the vote by the governor. Utah Code Ann. § 20A-7-311(1)(b), (c).

16. *The Attorney General Informal Opinion numbered 07-002 suggests that H.B. 174 could be funded through a statutory provision allowing an agency to request money for a "purpose or function" not specifically identified within the same appropriation item. Does H.B. 174 have a "different purpose or function" from H.B. 148 given AG Opinion 07-002 which states that the purpose is essentially the same?*

Certainly House Bills 174 and 148 have the same purpose, namely to provide for the creation of "The Parent Choice in Education Program." As the Attorney General Opinion No. 07-002 explains, the identical purpose of the two bills may allow the transfer of the appropriated monies to be executed without undue administrative machinations.

Alternatively, if the Board must resort to the administrative budget process in order to transfer the funds, then Utah Code Ann. § 63-38-3(e)(i) allows an agency to request that a budgetary appropriation be transferred in certain instances. In making such a transfer request, the Board should focus on the numbered bill which was the designated target of the appropriation. The express purpose of SB 3 was to provide an appropriation of $12,200,000 to the Board to implement H.B. 148. Because H.B. 174 was not specified in the applicable line item appropriation in SB 3, it is defensible for the Board to request a transfer of the appropriation under this provision.

The present analysis and that given in my prior opinion is intended to delineate alternative methods by which the transfer of the appropriated funds can be accomplished. Anything further would amount to rank speculation insofar as the determination of which transfer mechanism will be successful will ultimately be determined by the executive or legislative branch.

Additionally, the Utah Supreme Court has recognized the need for flexibility in allowing transfers of departmental budgetary appropriations. Martindale v. Anderson, 581 P.2d 1022, 1029 (Utah 1978). The court highlighted "the necessary balance between the government's need for flexibility in budgetary matters and the general public's right to be apprised of any intention to vary prior appropriations." Id. In the instant case, a transfer of the appropriation would strike the proper balance: recognizing the need for flexibility in carrying out the legislature's will while at the same time remaining faithful to the general public's right to know that the appropriation is still being utilized to fund the educational voucher program.

17. *Under H.B. 174, what is the State Board of Education's legal responsibility if the Office of Planning and Budget refuses the Sate* [sic] *Board's request to transfer funds?*

If the Office of Planning and Budget ("OPB") refuses the Board's request to transfer funds, it is difficult to predict what would be the Board's responsibility under H.B. 174. Many facts, which are speculative at this point, would come into play in such an analysis. The Board's responsibility would likely depend on the basis for the OPB's refusal to transfer funds and the status of the voucher program at the time of OPB's refusal. Also, the Board's responsibilities would depend on whether it had exhausted all possible avenues for transferring the funding as outlined in the Attorney General Opinion No. 07-002. See UT. Attn'y Gen. Policy Manual, Opinion Policy, §5.10(B)(1) (hypothetical and abstract issues are inappropriate subjects for attorney general opinions).

18. *Utah Code 63-38-3(e) provides that any "department, agency or institution for which money is appropriated" MAY request that the money be transferred . . . . If the Board chooses not to request the transfer, is that within the Board's prerogative? Would the AG defend the Board's right to make that discretionary decision?*

Utah Code Ann. §§53A-1a-804(4), and 53A-1a-806(1)(a) provide "the board *shall* award scholarships..." and "scholarships *shall* be awarded by the board subject to the availability of money appropriated by the Legislature for that purpose." This language is not permissive. The legislature has specifically appropriated funds to pay for the scholarships at issue. In fulfilling its statutory duty to implement the voucher program, it is incumbent upon the Board to use its best efforts to attempt to secure the monies appropriated for this purpose and thereby allow it to award scholarships to eligible recipients.

The plain language of §63-38-3(e), states "If any department, agency, or institution for which money is appropriated requests the transfer of moneys appropriated to it from one purpose or function to another purpose or function within an item of appropriation, the director of the Governor's Office of Planning and Budget shall require a new work program to be submitted for the fiscal year involved setting forth the necessity for such transfer." Contrary to the Board's characterization, this statute does not use the word "MAY." H.B. 174 requires the Board to award scholarships and Utah Code Ann. §63-38-3(e) provides one avenue for the Board to receive the funds in order to do so. See e.g., Bresolin v. Morris, 86 Wash.2d 241, 543 P.2d 325

(1975) (ordering agency to request the Legislature for an appropriation sufficient to maintain a program). Failure to make the scholarships available by refusing to request that the monies be transferred would likely subject the Board to further legal liability.[7]

The Board has asked "Would the AG defend the Board's right to make the discretionary decision?" As stated above, the AG does not believe that the board has the "right" or the "discretion" to refuse to make the scholarship monies available by refusing to request a transfer under Utah Code Ann. §63-38-3(e). This is not a situation where the legislature provided a laudable program but failed to fund it. The legislature specifically provided funding to implement the new voucher program, and as the entity charged with implementing that program, it is incumbent upon the Board to seek to have the funding transferred or reappropriated in order to accomplish that end.

19. *Since the State Board of Education is an independent constitutional body, can the Legislature force implementation of an education program without Board cooperation or without court action? Would the AG represent the State Board if such implementation were undertaken by an unauthorized entity?*

The Legislature cannot force implementation of an education program without court action. Although it would represent an extreme action, the State of Utah, through the Attorney General's Office could institute proceedings for a writ of mandate against the Board to compel the Board to implement the lawfully enacted voucher program. See Utah Code Ann. § 78-35-9; Chez, As Atty. Gen. v. Utah State Bldg. Comm., 93 Utah 538, 74 P.2d 687, 692 (1937) Crockett, Sec. of State v. Tuttle, 197 P. 900 (Utah 1921).

While the Legislature alone cannot compel implementation of the voucher program, the law-making power of the Legislature "is absolute and unlimited, except by the express restrictions of the fundamental law." University of Utah v. Shurtleff, 2006 UT 51, ¶31, 144 P.3d 1109, 1117 (quoting Kimball v. Grantsville City, 19 Utah 368, 57 P. 1, 4-5 (1899)). The Utah Supreme Court has consistently held that irrespective of whether an entity "is regarded as a constitutional corporation, it is not `completely free.'" Id. at ¶1121, 144 P.3d at 1121 (quoting University of Utah v. Board of Examiners, 4 Utah 2d. 408, 295 P.2d 348, 371 (1956). Rather a constitutional entity's powers are still circumscribed and it is still subject to the control of the state legislature. Id. Accordingly, the Court has held that such entities, like the Board, are "never exempt from the obligation of all Utah citizens and entities to follow Utah law." Id. at ¶ 39, 144 P.3d at 1118.

[7]Moreover, it should be noted that a government employee may be personally liable to a plaintiff if the government employee "acted or failed to act through fraud or willful misconduct." Utah Code Ann.§63-30d-202(3)(c)(I).

The second question is vague and would require more than a fair amount of speculation to answer. For example, it leaves open the questions of: whether the State Board would need representation as a plaintiff or defendant, who the unauthorized entity is, whether there exists a justiciable case and controversy, and the procedural posture and nature of the case. The hypothetical nature of this question makes it an inappropriate issue to be addressed in an attorney general opinion. See UT. Attn'y Gen. Policy Manual, Opinion Policy, §5.10(B)(1). The Attorney General's Office will always represent its clients in accordance with its constitutional and statutory duties as outlined in Article VII, §16 of the Utah Constitution and Section 67-5-1, et. seq. of the Utah Code.

20. *If the State Board of Education/client is not satisfied with the "Chinese wall" representation from the AG, how will the AG satisfy its responsibility to its client?*

Again, this question would require a great deal of speculation in order to answer. However, as we discussed in our meeting on Friday, May 18, 2007, I am certainly receptive to discussing with the Board various possibilities for providing it with the best and most appropriate legal representation in a particular matter. I clearly stated that I would be willing to explore the other options we discussed such as allowing the Special Assistant Attorneys General currently at the USOE to act as the Board's legal representatives in court, or obtaining outside legal counsel for the Board, subject to the availability of funding from by the Board or the Legislature.

21. *Does the Attorney General view the Utah State Board of Education and the Utah State Office of Education as separate clients? Is the AG's Office willing and able to represent both, if the answer is yes?*

Article 10, § 3 of the Utah Constitution establishes the Board and provides that it shall appoint a State Superintendent of Public Education, who shall serve as its executive officer. The USOE is the administrative agency charged with implementing the will of the Board through the State Superintendent, i.e., the USOE is in essence the staff of the Superintendent and carries out the day-to-day responsibilities of managing Utah's public education system. Utah Code Ann. §§53A-1-101, -302. As such, the Board, an elected body, and the USOE, an administrative agency, are two separate entities, whose interests and positions are normally closely aligned. It is my position that not only am I willing and able to represent both, but I am statutorily and constitutionally mandated to do so. See Utah Constitution Art. VII, §16; Utah Code Ann. §§ 67-5-1, et. seq.; UT Att'y Gen. Op. 02-003;

22. *Are the private schools that accept vouchers authorized under H.B. 148 and H.B. 174 part of the state's public education system?*

The answer to this question is central to the determination of whether the Parent Choice in Education Program is constitutional. Given its controversial nature, Utah's voucher program is

likely going to be the subject of litigation in which its constitutionality will presumably be challenged. Under these circumstances it is the policy of the Attorney General not to issue an opinion on matters that are the subject of likely litigation or concern the constitutionality of enacted legislation. UT. Attn'y Gen. Policy Manual, Opinion Policy, §5.10(B)(2), (6). However, I and my assistant attorneys general would be happy to discuss this question and advise the Board in a closed session if constitutional litigation is pending.

23. *Suppose that the State Board of Education accepts the argument, as expressed in your informal opinion numbered 07-002 that the title of HB 174 does not mean what it says, that is, that the word, "amendments," should be read to mean "repeal" or "bill in the nature of a substitute" or the like. Doesn't this construction of the title make HB 174 vulnerable to constitutional challenge under Article VI, Section 22, of the Utah Constitution? Please provide and explain the Board's most defensible action given this uncertainty.*

Although this question has been partially answered in my response to question 8, it is well settled by the Utah Supreme Court "that failure of the statute to comply with the constitutional requirement that the subject-matter of the statute be clearly expressed in its title does not render the statute unconstitutional as to subject-matters which are clearly expressed in the title. . ." State v. Hoffman, 91 Utah 462, 64 P.2d 615, 616 (1937) (citing Riggins v. District Court of Salt Lake Co., 51 P.2d 645, (1935)). Moreover, the constitutional provision that no bill contain more than one subject clearly expressed in the title, is to guard against surreptitious or inadvertent inclusion of subjects in legislation without the knowledge of the legislators. Kent Club v. Toronto, 6 Utah 2d 67, 305 P.2d 870 (1957). "The [voucher] program was and remains politically controversial. As such, it was greatly debated in legislative committee public hearings and by the entire legislature. It is evident that the program was not smuggled through the legislature." Davis, 166 Wisc. 2d at 512, 480 N.W. 2d at 462. The subject-matter of H.B. 174 was clearly expressed in the title, insofar as the bill pertained strictly to the establishment of an education voucher program and no other subjects were addressed in the bill.

24. *The Attorney General's Informal Opinion numbered 07-002 suggests that certain Board decisions make constitutional challenges more likely. Please identify for the Board members, which specific rule language puts the Board more and less at risk for constitutional challenges.*

This question has been mostly answered over the course of this opinion. However, one issue that was addressed in the draft twenty questions approved by the Board in the May 3, 2007 Board meeting concerned the "legal effect of the missing provision in H.B. 174 prohibiting the State Board from further regulating private schools" and the advisability of the Board engaging in such regulation. Legal guidance on this issue may be useful to the board in drafting appropriate rules.

The absence of H.B. 148's "Limitation on regulation of private schools" section has no legal effect. While the inclusion of specific language stating that the Board is prohibited from regulating private schools would have been a clear indication of legislative intent; the absence of such language does not give any state agency or school district the right to regulate private schools. Any entity attempting to regulate private schools would have to have independent authority to do so. I am unaware of any authority, independent of H.B. 174, which grants the Board the right to regulate private schools.[8]

Having a regulated public school system does not mean that private schools participating in the voucher program must be similarly regulated. "It is beyond question that the State Board has always been able to manage separate types of schools and programs differently." Utah School Bd.'s Assoc. v. Utah State Bd. of Educ., 2001 UT 2, ¶20, 17 P.3d 1125, 1131. In Davis, the Wisconsin Supreme Court reiterated its prior holding "that the appropriation of public funds to a private entity need only be accompanied by such controls as are necessary to fulfill the public purpose required. Depending on the circumstances, these controls do not necessarily have to be the same as those regulating similar public agencies." 166 Wisc. 2d at 540, 480 N.W. 2d at 474. Moreover, both the Milwaukee and Ohio voucher programs, which have passed constitutional muster, are "unregulated" voucher programs. As such, the programs ensure that participating private schools are only supervised by the state to the extent necessary under the circumstances to achieve the goal of improving educational quality. Id. at 513, 480 N.W. 2d at 463.

Based on this analysis, it is my opinion that the Board would clearly be exceeding its authority if it writes rules that further regulate private schools except where such regulation is expressly provided for in H.B. 174. Of course, if you have specific concerns regarding a particular rule, our office stands ready to review your draft language and offer our opinion on the possible legal implications of adopting the proposed rule as written.

25. *Further clarify how funds can be transferred within SB 3, Item 135. The options provided by the Attorney General's recent informal opinion seem contradictory in that, if funds can be used interchangeably for HB 148 and HB 174, why would the Board also request a transfer of funds for a "new work program" or request transfer "from one purpose or function to another purpose or function" as explained in Section 63-38-3(e).*

The options provided in the Attorney General Opinion No. 07-002 are not contradictory. At this juncture it is unclear under which method the transfer of funds for the scholarship program will

[8] Cf. Section 24, c. 45, p. 70, Laws 1899, reads as follows: "Local boards of health shall have jurisdiction in all matters pertaining to the preservation of the health of those in attendance upon the public and private schools in the city, to which end it is hereby made the duty of each of the local boards of health."

be made available to the Board. My opinion suggests options that are available to the Board to request a transfer of the appropriation in order for the Board to receive the funds it needs to carry out the educational voucher program. Because SB 3 states that the $12,200,000 is to be used "to implement the provision of *Education Vouchers"* it is possible that the funds can simply be made available to the Board to implement the voucher program created by H.B. 174. However, in the event that the transfer is not effectuated that simply, the procedure outlined under Utah Code Ann. §63-38-3(d) is available to the Board as a means through which the funds can be transferred to the Board for the scholarship program.

In conclusion, it is my opinion that this letter provides the Board with sufficient guidance to proceed with adopting rules to implement the "The Parent Choice in Education Program." As always, please do not hesitate to contact me with any questions or concerns you may have regarding this opinion, or if I may be of further assistance to the Board. I request, and welcome, the opportunity to appear with our attorneys before the Board to answer any further questions or deal with legal matters as they arise. I look forward to our continued efforts to resolve this matter in a professional and expeditious manner.

Very truly yours,

Mark L. Shurtleff
Attorney General

cc: Kim Burningham, Chair - Utah State Board of Education
Board of Education Members